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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-714

JUAN PEDRO FARINAS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 28, 1971.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Tenney, D.J.) dismissing the first indictment against petitioner is reported at 299 F.Supp. 852 (1969) and is set out in the Appendix, *infra* at pp. 1a[1] through 6a. The opinion of the United States District Court for the Southern District of New York (Cooper, D.J.) denying petitioner's motion to dismiss the second indictment is reported at 308 F.Supp. 459 (1969) and is set out in the Appendix, *infra* at pp. 10a

[1] All references "a" refer to the Appendix to this petition.

through 24a. The opinion of the trial court (Pollack, D.J.) denying petitioner's post-trial motion for a judgment of acquittal is unreported and is set out in the Appendix at 25a to 26a. The opinion of the Court of Appeals affirming petitioner's conviction is unreported and is set out in the Appendix, *infra* at 27a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 28, 1971. On October 28, 1971, Mr. Justice Marshall extended the time in which to file a petition for certiorari to November 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statement of the Case

On July 21, 1968, petitioner Juan Pedro Farinas, then 21 years of age and a member of the Progressive Labor Party, was ordered by his local Selective Service Board to report for induction into the armed forces at the Armed Forces Examining and Entrance Station (hereinafter AFEES), 39 Whitehall Street in New York City, by 7:00 A.M. on August 13, 1968 (29a). He appeared at the AFEES on the morning designated and prior to the appointed hour took part in a peaceful demonstration protesting the war and the draft in front of the induction center (29a). At approximately 7:15 A.M. Farinas entered the induction center and unlike the other inductees, was escorted to Room 203 of the AFEES by Captain Kenny, the AFEES Adjutant (administrative) officer, and one Master Sergeant Bereza. Because, according to Capt. Kenny,

Farinas had been the purported "object" of the demonstration, Kenny felt it was necessary to immediately counsel Farinas "for his own protection" (T. 41)[2] that if he were disruptive he would be declared uncooperative and ejected from the AFEES (T. 43). After being counseled, petitioner was permitted to enter the pre-induction processing in Room 204 with his leaflets. Capt. Kenny and Sgt. Bereza described Room 204 as an orientation room where in addition to filling out "some forms" the processees "spend a lot of time doing nothing" (T. 47, 48, 95). Upon entering Room 204, petitioner commenced distribution of his leaflets to the other processees (T. 79).

There were no published, written, or even settled rules concerning leafletting or speech-making in the AFEES. Sgt. Bereza, on his own initiative took the position that no leafletting was to be permitted, and so informed Farinas (T. 76, 77, 79, 90). Again on his own initiative, however, Bereza decided to make "an exception" and allow the petitioner to retain custody of his leaflets (T. 78, 30a). This exception was limited in scope to possession apparently, because—as discussed immediately below—it was the peaceful distribution of leaflets which touched off the clash between Farinas and Bereza from which the instant case flows.

Capt. Kenny, Sgt. Bereza's superior, took a very different posture in the framing of his personal rules. Leafletting and speech-making were not *per se* prohibited if they were not "disruptive" (T. 38, 53; Grand Jury Minutes 5). In his testimony before the Grand Jury, Kenny gave a more precise indication of where he drew the line:

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[2] References "T" refer to the trial transcript which is part of the record.

> The passing out of the literature itself would not constitute us calling him an uncooperative registrant, but when he began making the speeches and trying to persuade other registrants to follow in his path, this is when we would classify him as uncooperative (Grand Jury Minutes 5).

Upon discovering that petitioner had begun to leaflet, Sgt. Bereza requested him to return to Room 203 which petitioner preliminarily declined to do. Thereupon, Sgt. Bereza became somewhat emotional, attempted to grab petitioner's leaflets, failed, and then called for Capt. Kenny (T. 80, 81, 23). At that point petitioner returned to Room 203 from Room 204 where he was "counseled" by Capt. Kenny (T. 24, 82, 161). Thereafter petitioner returned to the induction processing Room 204 with his leaflets (T. 27, 31a). A short time later, possibly ten minutes, Capt. Kenny stated that he was again summoned to the second floor where he encountered Farinas, this time in Room 206, addressing some of the other processees on the immorality of U.S. military involvement in Vietnam (T. 27). (Sgt. Bereza was not present (T. 82).) At this point Capt. Kenny declared Farinas to be "uncooperative" and escorted him from the AFEES (T. 27, 65).

At no time did the government's witnesses contend that petitioner was violent (T. 70-71, 105). At no time did petitioner state to Capt. Kenny or Sgt. Bereza that he intended to refuse to submit to induction (T. 68, 107). Indeed, the evidence adduced at trial revealed beyond peradventure of a doubt that it was petitioner's intention to submit to induction in accordance with the Progressive Labor Party doctrine (T. 145, 148, 150, 151, 152, 156, 164,

177, 179, 181, 183). At no time was petitioner requested by Capt. Kenny to execute a statement as a noncooperator as provided for in AR 601-270, Sec. 3-31(c) (2) (T. 73).

Proceedings Below

Subsequently, a grand jury, in the Fall of 1968, returned an indictment against petitioner (2a). The crime charged therein cryptically alleged that petitioner had merely failed "to obey the orders of the representatives of the Armed Forces" while at the AFEES. No mention was made of a failure to report or a refusal to submit to induction. The indictment was subsequently dismissed for vagueness. See *United States* v. *Farinas*, 299 F. Supp. 852 (S.D. N.Y. 1969) (1a).

On May 29, 1969, the instant indictment was returned (7a-9a). It consisted of five counts. Counts I, II, and III were alleged violations of 32 C.F.R. 1632.14(b)(4), which proscribes the failure of a prospective inductee "to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished." Count I charged that the petitioner "failed to cease and desist distributing leaflets to other registrants when ordered to do so"; Count II that "failed to cease and desist making speeches to other registrants when ordered to do so"; and Count III, that he "failed to cease and desist engaging in boisterous and unruly behavior when ordered to do so". These three counts were consolidated as one count at the close of the government's case.

Petitioner's prosecution is the only known instance of proceedings under 32 C.F.R. 1632.14(b)(4).

Count IV charged the petitioner with failing, and neglecting and refusing "to report for and submit to induction into the Armed Forces of the United States."

Count V reiterated the conduct specified in Counts I, II, and III, charging that it constituted hindrance and interference with the induction process by "force and violence and otherwise" under 32 C.F.R. 1632.14(b)(4).

Questions Presented for Review

1. Whether 32 C.F.R. 1632.14(b)(4)—which is made the basis of a criminal prosecution for the first time in this case—contravenes the guarantees of free expression in the First Amendment in that it is overly broad and vague.

2. Whether 32 C.F.R. 1632.14(b)(4), as the basis of a criminal sanction, is within the scope of a valid delegation and sub-delegation of congressional authority, and specifically,

   a. Whether Congress could constitutionally effectuate such a delegation and sub-delegation; and

   b. Whether Congress intended to effectuate such a delegation and sub-delegation.

3. Whether Count IV of the indictment was fatally duplicitous; or alternatively, whether there was a fatal variance between indictment and proof?

Constitutional Provisions, Statutes and Regulations Involved

This case involves the First and Fifth Amendments to the Constitution of the United States; the Military Selective Service Act of 1967 (50 U.S.C. App. §451, et seq.); Title 32 C.F.R. §1632.14 and Army Regulation (AR) 601-270.

REASONS FOR GRANTING THE WRIT

I.

This case involves the first reported prosecution under 32 C.F.R. §1632.14(b)(4); that provision is overly broad and vague and thereby violates the guarantees of free expression in the First Amendment.

Section 1632.14(b)(4) requires a prospective inductee "to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished." As stated by the Court below, the regulation is given "teeth" by 50 U.S.C. App. §462(a), which makes the knowing failure to carry out "any of the provisions of this title . . . or the rules or regulations made or directions given thereunder" a felony.

The regulation as applied here permitted two low-ranking Army officials, acting without guide, standard or precedent, to reach independent, ad hoc, and inconsistent judgments as to the permissibility of leaflet distribution and oral commentary by a civilian processee. Such a circumstance is patently inconsistent with the constitutional norm ex-

pressed by this Court in *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51 (1969):

> "A law submitting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective or definite standards to guide the licensing authority is unconstitutional."

See also, e.g., *Cohen* v. *California*, —— U.S. ——, 29 L.Ed. 2d 284 (1971); *Coates* v. *Cincinnati*, —— U.S. ——, 29 L.Ed. 2d 214 (1971); *Thornhill* v. *Alabama*, 310 U.S. 88 (1939); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *United States* v. *L. Cohen Grocery*, 255 U.S. 81 (1921).

Section 1632.14(b)(4) contains no standards, and provides no guidance to the Armed Forces representatives as to what conduct may be permitted or proscribed in the induction center. Specifically, it provides no limitation whatsoever upon the degree of restraint upon speech and speech related activities which the Armed Forces representatives may choose to apply.

The Court of Appeals recognized that ". . . this regulation . . . might raise serious constitutional questions, cf. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1965),"[3] but went on to conclude that:

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[3] See p. 33a. A recognition of the potential constitutional abuses of an unrestrained authority to restrain speech and speech related activities runs through the opinions of all the courts which

> ". . . when viewed [however] in context as applied it appears to be reasonably essential to the performance of a basic governmental function, and sufficiently narrow and limited in scope to constitute a permissible restriction upon the exercise of First Amendment rights [citing *Cox* v. *Louisiana,* 379 U.S. 536, 559 (1965)] . . . the regulation by its terms applies only to registrants who have reported to the induction center, and it may not be employed to suppress speech beyond what is required by the exigencies of the induction process. *Callison* v. *United States,* 413 F.2d 133 (9th Cir. 1969)" (34a).

This conclusion was apparently based upon two propositions. The first is an adoption of the saving gloss put on

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have reviewed the petitioner's claims. Judge Tenney, who dismissed the first indictment observed:

> "This Court can conceive of certain orders, unrelated to the induction process, which a civilian would not under law be necessarily required to follow." *United States* v. *Farinas,* 299 F. Supp. 852, 854 (S.D.N.Y. 1969).

And Judge Cooper, who nevertheless sustained the second indictment, acknowledged that:

> "This regulation requiring that an inductee obey all orders given him by appropriate personnel at an induction center appears at first blush to vest in such military officials untrammeled authority and discretion. From the face of the indictment itself, alleging violation of specific orders directed to defendant to cease making speeches and distributing leaflets, it is clear that *this regulation can restrict an inductee's freedom of speech.*" *United States* v. *Farinas,* 308 F. Supp. 459, 463 (S.D.N.Y. 1969) (emphasis added).

Judge Cooper also candidly noted that

> "the narrow application of this regulation might not by itself validate its delegation of 'licensing' power if the discretion vested in those authorized to give orders were unrestrained." *Id.* at 464. Cf. p. 8, *supra.*

the regulation by Judge Cooper in his opinion denying petitioner's pre-trial motions to dismiss the indictment:

> "[T]o be legal and enforceable, orders given pursuant to the authority of 32 C.F.R. §1632.14(b)(4) must relate to the induction process."

United States v. *Farinas*, 308 F. Supp. 459, 464 (S.D.N.Y. 1969). The second is the fact that the regulation is limited "in time . . . and place" to the induction center at the time of the induction process (35a).

But to say that orders under §1632.14(b)(4) must be limited to those which "relate to the induction process" is to leave open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *United States* v. *L. Cohen Grocery Co., supra*, 255 U.S. at 89. The government itself has conceded that orders under the regulation "could be infinite in variety."[4] The prohibition of all speech, including conversation, within the induction center would "relate to the induction process"; so indeed would the prohibition of all speech which contained statements of opposition to the war, or to the military establishment.

The Court of Appeals below was satisfied that it had placed a sufficiently limited construction upon the regulation:

> "The objective of the regulation is clear: to authorize the issuance of orders that would facilitate the uninterrupted processing of inductees. By its own terms

[4] This statement is from the government's memorandum in opposition to petitioner's motion to dismiss the first indictment, at page 3.

and by reason of its place in a specific regulatory scheme, the regulation must be construed narrowly and constricted in its applicability by limitations as to person, time, and place that will avoid unconstitutionality. *Scales* v. *United States,* 367 U.S. 203 (1961); *United States* v. *Spock,* 416 F.2d 165, 173 n. 20 (1st Cir. 1969). We therefore find no constitutional infirmity. *Eisner* v. *Stamford Board of Education,* 440 F.2d 803 (2nd Cir., 1971)" (35a).

But in reality, the restrictions recognized by the Court below amount to very little more than a recognition that the orders under §1632.14(b)(4) are necessarily limited in time, place and substance to the conduct of a processee at the induction center. In effect, the Court's conclusion that this saves the regulation constitutes a judgment that the power to restrain the speech of processees within a place of induction, however broad and standardless, is constitutional. This in turn is the functional equivalent of a judgment that all speech guarantees are suspended at the time and place of military induction.

Yet there is nothing about the induction process which supports the view that its orderly progression can be maintained only by investing the Armed Forces representatives who conduct it with unfettered authority to restrain speech. That however is exactly what §1632.14(b)(4) does, even as "restricted" by the limitations of the Court below.[5]

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[5] It should be noted that neither the indictment nor the trial judge's instructions limited the offenses under §1632.14 to any interference with the induction process. This element of interference, in fact, is what distinguishes Counts I, II & III from Count V. Petitioner raised this issue below and preserves it should certiorari be granted but does not now brief the question fully. Similarly we contend, as was argued below, that the evidence was insufficient to sustain convictions on Counts I-III and V; and that certain evidentiary rulings require reversal.

II.

This novel prosecution is based upon a broad and standardless delegation and sub-delegation of congressional authority, such a delegation is constitutionally impermissible and was not intended by Congress.

Two propositions underly the arguments in this section. First, where, as here,* First Amendment rights are involved, the issue of deletion becomes one of special concern, and courts "must construe narrowly all delegated powers that curtail or dilute" such rights. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). Second, it is likewise axiomatic that where Congress has delegated the task of framing regulations to an administrative body and makes a violation of those regulations criminal, such regulations must be framed with considerable precision. See, *United States* v. *Grimaud*, 220 U.S. 506, 522 (1911); *M. Kraus & Bros.* v. *United States*, 327 U.S. 614, 621-22 (1946); *Porter* v. *Federated Meat Corp.*, 157 F.2d 276 (2nd Cir. 1946); *United States* v. *Blumberg*, 258 F.Supp. 885 (D. Del. 1966); *United States* v. *A. & P. Trucking Corp.*, 113 F.Supp. 349 (D.N.J. 1953); *United States* v. *Illinois Central R.R. Co.*, 269 F.Supp. 236 (W.D. Tenn. 1967). In the instant case, the delegation and sub-delegation of congressional authority make speech and speech-related activities criminal.

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* See generally, Kaufman, *The Medium, The Message and The First Amendment*, 35 N.Y.U.L. Rev. 761, 776 (1970):

> "... hand distribution of literature [is] a means of communication involving slightly more activity than merely speaking and one which traditionally has been afforded a large measure of protection under the First Amendment."

E.g., see *Wolin* v. *Port Authority*, 392 F.2d 83 (2nd Cir. 1968) cert. denied 393 U.S. 940 (1969); *Unemployed Workers* v. *Hackett*, 40 U.S.L.W. 2273 (D.R.I. 1971).

A. *The Impermissible Delegation of the Legislative Power.*

§12(a) of the Act imposes severe criminal sanctions on any registrant "who in any manner shall knowingly fail or neglect or refuse to perform any duty" required under the Act itself, or the rules, regulations or directions issued thereunder.

While it is acknowledged that the Act empowers the President to prescribe the necessary rules and regulations to carry out its provisions,

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

See also *Kent v. Dulles*, 357 U.S. 116 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Zemel v. Rusk*, 381 U.S. 1, 22 (1965) (Black, J., dissenting).

It is, of course, also acknowledged that Congress has the power, subject to constitutional limitations, to make it a crime for persons to violate a duty imposed by statute. However, Congress may not constitutionally exercise the power to make it a crime to "fail or neglect or refuse to perform *any* duty required"[*] by the Act, or the rules, regulations and directions issued thereunder, without establishing guide lines in the form of legislative standards for the exercise of this delegation of authority. See *Lambert v. California*, 355 U.S. 225 (1957); *Smith v. California*, 361 U.S. 147 (1959).

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[*] 50 U.S.C. App. §460(b)(1).

[*] Emphasis added.

Section 12(a) of the Act is utterly bereft of any standards by which Congress has prescribed limits to the delegated authority. Cf. *Gutknecht* v. *United States*, 396 U.S. 295, 306 (1970); *United States* v. *Eisdorfer*, 299 F. Supp. 975 (E.D.N.Y. 1969), appeal dismissed 396 U.S. 1066 (1970).

Indeed, the impermissible breadth and scope of the delegation approaches "inherently boundless" proportions where the statute refers not only to rules and regulations, but to unspecified "directions" which presumably can be issued by any one of the thousands of local draft boards throughout the United States. *Cohen* v. *California*, —— U.S. ——, 29 L. Ed. 2d 284, 294 (1971).

As Judge Dooling has accurately observed with respect to the duties embodied in the Selective Service Regulations:

> "The registrant's duties embrace not only the primary ones of registration, submission to specific directions to report (as for examination), and submission to induction, but also secondary duties that in some instances do no more than facilitate administration of the system and in others are more evidently in some form indispensable to effective administration of the law. Some of the duties are expressed in such terms that literal interpretation of them is impossible, and they invite judgmatical approximations of compliance that could easily be wrong." *United States* v. *Eisdorfer*, *supra* at 299 F. Supp. 988.

Judge Cooper, in deciding petitioner's pre-trial motion to dismiss the indictment acknowledged that the statute permits a "concededly broad" standard of delegation to the

administrator, but held that the standard set forth in the statute allowing the administrator to "carry out the provisions" of the Act "to be constitutionally adequate." *United States* v. *Farinas*, 308 F. Supp. 450, 463 (S.D.N.Y. 1969). The court below upheld this contention. *United States* v. *Farinas* (35a).

One looks in vain, however, for any standards which the administrator is to apply. For example, focusing upon 32 C.F.R. §1632.14, a registrant is required to obey the orders of his local board, a clerk of his local board, a leader or assistant leader appointed for the group of inductees to which he is assigned, as well as any and all representatives of the Armed Forces who happen to be assigned to his induction center. This is, as Mr. Justice Cardozo put it, "delegation running riot." *Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 553 (1935) (concurring opinion).

To compound the constitutional infirmity, present here is also a sub-delegation from the Selective Service System to the military—i.e., those Armed Forces personnel who happen to be stationed at induction centers. Needless to say, there are simply no standards set forth for the exercise of the sub-delegate's authority. Cf. *Washington* v. *Robenge*, 278 U.S. 116 (1928).

Could Congress delegate to a Sergeant Bereza the authority to deny distribution of *all* leaflets because he viewed such practice with disfavor? (T. 76, 77, 79, 90). Or, are we to look to Captain Kenny, who was a bit more tolerant though confused in even his own formulation of a standard to apply (T. 38, 53, G.J.M. 5). As this Court has recognized, in *Cohen, supra* ". . . governmental officials cannot make principled distinctions in this area." *Id.* at 294. See also *Coates* v. *Cincinnati*, —— U.S. ——, 29 L.Ed.2d 214, 217-18 (1971).

B. *Congress Never Intended That a Violation of 32 C.F.R. §1632.14(b)(4) Be Made Criminal.*

§12(a) of the Act does not state that it is a crime to disobey the orders of the representative of the Armed Forces while at the induction center. Instead, §12(a) contains a general statement of criminality which includes one who knowingly fails, refuses or neglects "to perform any duty . . . required of him under or in the execution of this title."

The question then becomes whether Congress intended that the violation of any and every duty imposed by the Regulations should be made criminal. Such constructional adventurism is neither judicially condoned nor should be made common when construing criminal statutes. *United States* v. *Boston & Maine Railroad*, 380 U.S. 157, 160 (1965). See also, *Smith* v. *United States*, 360 U.S. 1, 9 (1959); *Commissioner of Internal Revenue* v. *Acker*, 361 U.S. 87, 91 (1959).

There is little, if any, legislative history to assist the Court in ascertaining the intention of Congress. On the other hand, research fails to reveal the existence of a single instance, other than the case at bar, where a registrant was prosecuted for violation of 32 C.F.R. §1632.14(b)(4)—itself an indication that a violation of this regulation was not intended to be made criminal.[9] Compare the regulatory basis for the prosecutions in *Callison* v. *United States*,

[9] The failure to enforce §1632.14(b)(4) by criminal prosecution may well render it unenforceable under the doctrine of desuetude recognized by the Supreme Court in *Poe* v. *Ullman*, 367 U.S. 497 (1961). But whether or not that doctrine is directly applicable, the failure to enforce the regulation must be taken into consideration in considering the ambit of its intended operation.

413 F.2d 133 (9th Cir. 1969) and *United States* v. *Meyers*, 410 F.2d 693 (2nd Cir.), cert. den., 396 U.S. 835 (1969).[10]

It would seem that disobeying the orders of representatives of the Armed Forces while at the induction center is in the same category of non-criminal behavior as disobeying the "instructions of the leader or assistant leaders appointed for the group being forwarded for induction", a like duty imposed upon a registrant by the same regulation 32 C.F.R. §1632.14(b)(2).[11]

It is hardly credible that Congress intended to make the disobeyal of an order of a leader" (a fellow inductee) the predicate for a criminal prosecution and imprisonment, if convicted, for a term of five years.

Similarly, §1632.14(b)(6) of the regulations imposes a duty upon the registrant, in the event that he is found not qualified for induction, "to follow the instructions of the representatives of the Armed Forces as to the manner in which he will be transported on his return trip to the local board." The Government can hardly assert with seriousness that a registrant so situated who digressed from this route would be subject to prosecution under §12(a) of the Act for violating his prescribed duty?

And what of that portion of the same regulation which imposes a duty upon the registrant "to follow the instructions of a member or clerk of the local board as to the man-

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[10] 32 C.F.R. 1632.14(b)(5).

[11] §1632.15 of the regulations directs that when the registrants who are to be forwarded for induction have assembled, the local board shall *appoint from such registrants* a leader and assistant leader who "shall have such authority as is necessary to deliver the group to the place of induction."

ner in which he shall be transported to the location where his induction will be accomplished"? §1632.14(b)(1). It is difficult to imagine the Government attempting to support a prosecution under §12(a) for violation of a duty where the registrant happened to stray from the course to the induction center designated by a clerk of his local board.

The regulations are replete with duties imposed upon a registrant, some of which, as Judge Dooling has observed,

> "are expressed in such terms that literal interpretation of them is impossible, and . . . invite judgmatical approximations of compliance that could easily be wrong." *United States* v. *Eisdorfer, supra* at 988.

Under well settled principles of construction, it cannot be said that Congress ever intended that the disobeyal by a civilian of orders of the sort in question here were to be made criminal. The Government cannot expand the Act in the manner which it now seeks to do—to create a crime based on acts which Congress never intended to be made criminal, and which the Government itself has never before sought to make criminal.

III.

The decision of the Court below, sustaining petitioner's conviction for failing and neglecting "to report for and submit to induction," is in conflict with decisions of the Third and Ninth Circuit Courts of Appeal.

The crime charged against petitioner in Count IV (8a-9a) was that of failing and neglecting to comply with an order of his local board "to report for and submit to induction" (9a).

The record is plain, that petitioner did "report" for induction and that he was not given the opportunity to "submit" to induction as prescribed by Army Regulations. The issue in dispute, therefore, is whether his conviction for failing "to report for and submit to induction" can stand.[12]

The procedure regulating the induction process is set forth in precise detail in Army Regulation 601-270.[13] Paragraph 37(a) provides that "all registrants" will be assem-

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[12] Prior to trial, petitioner moved to quash the indictment for duplicity but the motion was denied as premature. 308 F. Supp. 459, 467 (S.D.N.Y. 1969). The issue was extensively briefed on appeal, the principal contention being that the trial of petitioner on Count IV and Judge Pollack's charge to the jury on that Count were in patent violation of the holdings of this Court in *Stirone* v. *United States*, 361 U.S. 212 (1959) and *Russel* v. *United States*, 369 U.S. 749 (1963). Petitioner preserves this claim should certiorari be granted, but does not now argue it, except to note that the decision below as to Count IV is also in direct conflict with the decision of the Fifth Circuit in *Schutz* v. *United States*, 422 F.2d 991 (5th Cir., 1970).

[13] Induction centers are under the control and operation of the armed forces. Selective Service Regs. 1602.7, 1632.14(b), 1632.15 (e).

bled and informed "of the imminence of induction, quoting the following: . . . ." The quote which follows informs the group that "they will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces indicated." Paragraph 37(a)(2) provides for the quiet and courteous removal of any registrant who fails to take the requisite step forward.

Paragraph 40(c) sets out the procedure to be followed with registrants who refuse to submit to induction and who have been removed from the group under paragraph 37(a)(2). Any such registrant is to be informed that his refusal to submit is a felony subject to 5 years imprisonment and a $10,000 fine, or both; he will again be informed of the imminence of induction by the language specified in paragraph 37(a)(1) and given a second chance to take one step forward. If he again refuses, the registrant will be requested to sign a statement saying "I refuse to be inducted into the Armed Forces of the United States." He is then free to go (though in some federal judicial districts a registrant who refuses to submit is arrested immediately).

This procedure was not followed in petitioner's case. Rather, after properly reporting for induction, he notified the military personnel at the induction center that "he had no intentions to process in any way, such as physical examination or mental" (T 23). Though informed of the penalties for being uncooperative, petitioner was not given the opportunity to refuse to submit to induction under the explicit procedures prescribed under AR 601-270.

To the extent that the Court below discussed this issue, it totally misread certain language from *Billings* v. *Trues-*

dell, 321 U.S. 542, 557 (1944).[14] The Court of Appeals' opinion recognizes that petitioner was charged in the conjunctive, and though it acknowledges that petitioner did report, concludes that an order of a draft board to report for induction also encompasses an order to *submit* to induction. That, with deference, rather begs the question because, not having been given the opportunity to submit under AR 601-270, petitioner cannot be said to have disobeyed the draft board's order which also encompasses an order to *submit* to induction.

The decision of the Second Circuit is thus in conflict with the decision of the Ninth Circuit in *Chernekoff* v. *United States,* 219 F.2d 721 (1955) and the Third Circuit in *United States* v. *Kroll,* 402 F.2d 221 (3rd Cir. 1968), *cert. den.* —— U.S. —— (1969). In *Chernekoff* the defendant was not given the opportunity to step forward under the predecessor (but substantially equivalent) regulation to AR 601-270,[15] because "he had said he would not if asked to do so step forward and become inducted into the Armed Forces." 219 F.2d at 725. The Ninth Circuit, in reversing the conviction, said:

> "It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulations to seriously reflect and to let actions speak louder than words . . . . [I]t is highly important that the moment a selectee becomes subject to military authority be

[14] The *Billings* dictum holds only that failure to report for induction is equally as much a crime as refusing to submit to induction—*not that they are the same crime.*

[15] The predecessor Army Regulation, 615-180-1, is set out at 219 F.2d at 724, n. 12.

marked with certainty. It is also important that the moment he becomes liable for civil prosecution be marked with certainty. The special regulation fulfills such a need." *Ibid. Accord, Kroll, supra* at 402 F.2d 222.

This conflict between *Chernekoff, Kroll* and the case at bar, should be settled by this Court in order to make perfectly clear what the respective obligations of registrants and armed forces personnel are at the induction center. We urge, of course, that the *Chernekoff-Kroll* rule is the sound rule for it eliminates any ambiguity about the intentions of a prospective draftee.

POINT IV

The conviction under Count V should be reversed because 50 U.S.C. App. §462(a) and 32 C.F.R. §1632.-14(b)(4) were unconstitutionally utilized to exclude the exercise of First Amendment activities.

Clearly, the activities of the petitioner as set forth in the fifth count of the indictment (9a), speaking and distributing leaflets, are classic expressions of First Amendment rights.[16]

As if it were anticipating the later expansion by this Court of First Amendment rights in the context of debilitating criminal prosecutions, the Court of Appeals in

[16] The added allegation that petitioner engaged in "boisterous and unruly behavior" does not denigrate from the profound First Amendment considerations present here. It is difficult to conceive that Congress ever intended such conduct in and of itself to be the predicate for a possible term of imprisonment of up to five years. More likely than not, such conduct is a misdescriptive characterization of the speech making and distribution of leaflets.

Bagley v. *United States*, 136 F.2d 567 (5th Cir. 1943), held that the limiting term "force and violence" contained in 50 U.S.C. App. §462(a),

> " . . . was not put there by accident or inadvertence. It was carefully chosen by Congress when this country was not at war but only preparing for its eventuality in order to insure the fullest preservation of expression of opinion that the act would not be the instrument of partisan prosecution to suppress that freedom, and that prosecutions under it would be brought only where there was forcible rather than ideological opposition to the draft." 136 F.2d at 569.

The exercise of such rights, even in an induction center, cannot be made the very foundation of a prosecution for the offense charged in this indictment. As the Court of Appeals observed in *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969), speech cannot be forbidden "merely because the natural consequences might be to interfere with [the Government], or even lead to unlawful action." *Spock, supra*, citing *Bond* v. *Floyd*, 385 U.S. 116 (1966). Accord, *Cohen* v. *California*, —— U.S. ——, 29 L.Ed.2d 284, 292 (1971):

> " . . . so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First Amendment be punished for asserting the evident position on the inutility or immorality of the draft . . . ".[17]

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[17] "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969)." *Cohen, supra*, at 29 L.Ed.2d 292.

While it may be conceded that Congress has the power to authorize the use of criminal sanctions against one who forcibly hinders or interferes with the Act, nevertheless, the First Amendment denies it the power to do so in a case such as this where the government's witnesses themselves admitted that petitioner was never violent (T. 70-71, 105) and where the activities petitioner engaged in took place in a room of the induction center which the same government witnesses admitted that other processees spent "a lot of time doing nothing" (T. 47, 48, 95).

In short, if the defendant is to be prosecuted for hindering or interfering with the Act based on the activities alleged in the indictment, the statute and regulation must fall for overbreadth and consequently the conviction under Count V must be reversed.

CONCLUSION

For all of the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted.

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Opinion of the United States District Court
Dated May 9, 1969

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 68 CR. 927

UNITED STATES OF AMERICA

v.

JUAN PEDRO FARINAS,

Defendant.

ROBERT M. MORGENTHAU, U. S. Atty., Southern Dist. of New York, *for plaintiff*, Charles B. Updike, New York City, of counsel.

SANFORD M. KATZ, New York City, *for defendant*.

MEMORANDUM

TENNEY, *District Judge*:

Defendant moves herein to dismiss the indictment charging him with a violation of the Selective Service Act of 1967, for a bill of particulars, and for discovery and inspection. Inasmuch as it is the opinion of this Court that the indictment lodged herein is too vague in its language to enable the defendant to properly prepare his defense, defendant's other motions need not be considered at this time.

The indictment in this case provides:

"The Grand Jury charges:

On or about the 13th day of August, 1968, and up to and including the date of the filing of this indictment, in the Southern District of New York, JUAN PEDRO FARINAS, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 et seq. and the rules, regulations and directives made pursuant thereto, in that he, being a registrant, to whom an Order to Report for Induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to obey the orders of representatives of the Armed Forces of the United States, while at the place where his induction was to be accomplished. (Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)" [1]

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[1] Title 50 App., United States Code, Section 462(a), provides in pertinent part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title * * * shall, upon conviction * * * be punished by imprisonment for not more than five years or a fine of not more that $10,000, or by both such fine and imprisonment * * *."

32 C.F.R. § 1632.14 provides in pertinent part:

"(b) Upon reporting for induction, it shall be the duty of the registrant * * * (4) to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished * * *."

In Lowenburg v. United States, 156 F.2d 22 (10th Cir. 1946), the defendant, classified IV-E under the Selective Service Act, was assigned to work of national importance at various camps, including the Civilian Public Service Camp at Mancos, Colorado, and allegedly failed to perform his duties satisfactorily. The court held that an indictment which merely charged a defendant with refusing to perform "the duties assigned to him by the director of said Civilian Public Service Camp No. 111, in the Town of Mancos, in the County of Montezuma, in the State of Colorado", without apprising the defendant of the specific duties which he is charged with having failed to perform, did not meet the minimum requirements of good pleading and was, therefore, legally insufficient to charge the accused with the commission of a public offense.

Inasmuch as the fundamental purpose underlying Rule 7(c) of the Federal Rules of Criminal Procedure[2] is to inform a defendant of the nature of the charges leveled against him and, therefore, of what he must be prepared to meet, Wright, Federal Practice and Procedure § 125 at 232-33 (1969), it is the opinion of this Court that the indictment in this case serves that end no better than that which was before the court in *Lowenburg, supra.* Although the indictment herein goes one step further by charging that the defendant failed in his duties *by refusing to obey certain orders,* its failure to specify the nature of the orders allegedly disobeyed renders that step a negligible one in light of the basic function of an indictment.

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[2] Fed.R.Crim.P. 7(c) provides in pertinent part:

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

It is well established that the purpose of an indictment is to fully apprise the defendant of the crime with which he is charged so that he may properly prepare his defense. United States v. Simmons, 96 U.S. 360, 362, 24 L.Ed. 819 (1877). To this end, it has been held that although an indictment may be drafted in the language of the statute so long as the language employed contains all the essential elements of the offense charged, United States v. Spada, 331 F.2d 995 (2d Cir.), *cert. denied*, 379 U.S. 865, 85 S.Ct. 130, 13 L.Ed.2d 67 (1964); United States v. Cimino, 321 F.2d 509, 512 (2d Cir.), *cert. denied* sub nom. D'Ercole v. United States, 375 U.S. 967, 84 S.Ct. 486, 11 L.Ed.2d 416 (1963), where the statutory definition "* * * includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to the particulars. * * *" United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed 588 (1875); United States v. Hess, 124 U.S. 483, 488, 8 S.Ct. 571, 31 L.Ed. 516 (1888); United States v. Guterma, 189 F.Supp. 265, 270-271 (S.D.N.Y. 1960). In other words, if a statute upon which an indictment is lodged fails, by virtue of its general terminology, to sufficiently apprise the defendant of what he needs to know in order to commence the preparation of a defense, the indictment cannot suffer from the same defect, but must specifically set forth the facts which constitute the core of the alleged offense.

The indictment in this case, which charges the accused with failing to obey orders of certain representatives of the Armed Forces of the United States while the accused was present at the place where his induction was to be accomplished, not only could conceivably fail to state

a crime (see discussion below) but, most importantly, falls below the minimum standard of specificity in respect of the requirement of reasonable notice. United States v. Hess, *supra;* United States v. Cruikshank, *supra;* Lowenberg v. United States, *supra;* United States v. Turner, 274 F.Supp. 412, 417 (E.D.Tenn. 1967); United States v. Simplot, 192 F.Supp. 734, 737 (D.Utah 1961); United States v. Devine's Milk Laboratories, Inc., 179 F.Supp. 799, 800-801 (D.Mass.1960); United States v. Apex Distrib. Co., 148 F. Supp. 365, 372 (D.R.I.1957).

Further, where an indictment condemns an act belonging to a species of conduct, which species includes other acts not amounting to indictable offenses, it is not sufficient that the indictment merely identifies the species in general but, rather, it must particularize the act or acts which, it is alleged, constitute the offense charged, Mims v. United States, 332 F.2d 944, 946 (10th Cir.), *cert. denied,* 379 U.S. 888, 85 S.Ct. 158, 13 L.Ed.2d 92 (1964), so that the court can be assured that the indictment charges conduct which is, in fact, prohibited by law. Russell v. United States, 369 U.S. 749, 768 n. 15, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); United States v. Cruikshank, *supra* at 558-559 of 92 U.S.; United States v. Lamont, 18 F.R.D. 27, 31 (S.D.N.Y. 1955), *affirmed,* 236 F.2d 312 (2d Cir. 1956).

In the present case, inasmuch as this Court can conceive of certain orders, unrelated to the induction process, which a civilian would not under law be necessarily required to follow, it would seem fundamental that the indictment recite the particular order or orders which the accused is alleged to have disobeyed.

Although the Government consents to furnish the accused, in a bill of particulars, the specific orders to which

the indictment refers, this Court follows the proposition that a bill of particulars cannot save an invalid indictment. Russell v. United States, *supra* 369 U.S. at 770, 82 S.Ct. 1038; United States v. Seeger, 303 F.2d 478, 484 (2d Cir. 1962); United States v. Lamont, 236 F.2d 312, 315 (2d Cir. 1956). To do otherwise would invite the Government to usurp the functions of the Grand Jury.

Needless to say, the Government's contention that inasmuch as the defendant was present at the induction center when the incident took place, " * * * no one knows better than he what went on. * * * ", requires no discussion.

For the above-stated reasons, and with a view towards assuring that indictments remain effective for their intended purpose, the within motion by defendant to dismiss the indictment is granted.

So ordered.

Second Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed May 29, 1969

INDICTMENT

69 Cr. 481

UNITED STATES OF AMERICA

—v—

JUAN PEDRO FARINAS,

Defendant.

The Grand Jury charges:

On or about the 13th day of August, 1968, in the Southern District of New York, JUAN PEDRO FARINAS, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform duties required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*, and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom an Order to Report for Induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to obey the orders of representatives of the Armed Forces of the United States, while at the place where his induction was to be accomplished, as hereinafter set forth:

COUNT ONE

Defendant, JUAN PEDRO FARINAS, failed to cease and desist distributing leaflets to other registrants when ordered to do so.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)

COUNT TWO

Defendant, JUAN PEDRO FARINAS, failed to cease and desist making speeches to other registrants when ordered to do so.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)

COUNT THREE

Defendant, JUAN PEDRO FARINAS, failed to cease and desist engaging in boisterous and unruly behavior when ordered to do so.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)

COUNT FOUR

The Grand Jury further charges:

On or about the 13th day of August, 1968, and up to and including the date of the filing of this indictment, in the Southern District of New York, JUAN PEDRO FARINAS, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*,

and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom an Order to Report for Induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to report for and submit to induction into the Armed Forces of the United States.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)

COUNT FIVE

On or about the 13th day of August, 1968, in the Southern District of New York, JUAN PEDRO FARINAS, the defendant, unlawfully, wilfully and knowingly, by force and violence and otherwise hindered and interfered with the administration of the Military Selective Service Act of 1967, Sections 451 through 471, and the rules and regulations made pursuant thereto in that after being warned that activity disruptive of the processing of other registrants would constitute a felony, JUAN PEDRO FARINAS, the defendant persisted in such activity by making speeches, distributing literature, and engaging in boisterous and unruly behavior.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.)

NATHANIAL CRAMER.
Foreman

ROBERT M. MORGENTHAU
Robert M. Morgenthau
United States Attorney

Opinion of the United States District Court
Dated December 30, 1969

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 69 Cr. 481

UNITED STATES OF AMERICA,

v.

JUAN PEDRO FARIAS,

ROBERT M. MORGENTHAU, U.S. Atty., New York City, Southern Dist. of New York, *for the United States*. PETER L. FRIEDMAN, Asst. U. S. Atty., of counsel.

SANFORD M. KATZ, New York City, *for defendant*.

OPINION

COOPER, *District Judge*.

Defendant's various motions seek dismissal of this indictment charging him in five counts with violating the Military Selective Service Act of 1967, discovery and inspection of certain material, and a bill of particulars.

I. *Dismissal of the Indictment*

On November 13, 1968, the Grand Jury filed indictment No. 68 Cr. 927 charging defendant in one count with failure to perform duties required of him under the Military

Selective Service Act of 1967, 50 U.S.C. App. § 462(a), and the rules and regulations promulgated thereunder, in that he, as a registrant ordered to report for induction, knowingly failed to obey the orders of Armed Forces representatives while at the place of induction. That indictment was subsequently dismissed by Judge Tenney as being too vague to permit defendant to adequately prepare a defense because the "orders of certain representatives of the Armed Forces of the United States" allegedly disobeyed were not specified or recited therein. United States v. Farinas, 290 F.Supp. 852 (S.D.N.Y. 1968).

Defendant's case was then presented anew to the Grand Jury resulting in the filing on May 29, 1968 of the instant five-count indictment, 68 Cr. 481, which charges that defendant:

> (a) knowingly failed, neglected and refused to obey the orders of representatives of the Armed Forces of the United States while at the place of induction, to wit, he failed when ordered to do so to cease and desist distributing leaflets to other registrants, making speeches to other registrants, and engaging in boisterous and unruly behavior (Counts 1-3);
>
> (b) knowingly failed, neglected and refused to report for and submit to induction into the Armed Forces of the United States (Count 4);
>
> (c) knowingly, by force and violence and otherwise, hindered and interfered with the administration of the Military Selective Service Act of 1967 in that after being warned that activity disruptive of the processing of other registrants would constitute a felony, he persisted in such activity by making speeches, distribut-

ing literature and engaging in boisterous and unruly behavior (Count 5). See 50 U.S.C. App. § 462(a); 32 C.F.R. § 1632.14.

A. *All five counts*

1. vindictiveness

Defendant first moves for dismissal of the indictment on the ground that the return of a five-count indictment following dismissal of the prior one-count indictment "constitutes a form of vindictiveness against the defendant in violation of the due process provisions of the Fifth Amendment."

We have no evidence of vindictiveness here. Indeed, defendant has obtained that which he sought: specification and particularization of the offenses charged. In any event defendant has not been prejudiced by the filing of a five-count indictment. The authorities relied upon by defendant, all involving a defendant who had been treated more severely following the assertion of certain constitutional rights, are inapposite. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (more severe sentence on retrial); United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (exposure to death penalty if trial by jury); Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969) (charging a felony on retrial in place of a misdemeanor). Here the maximum penalty to which defendant could be subjected if convicted has not been increased by the additional counts since all offenses charged arose out of a single incident. See United States v. Ketchum, 320 F.2d 3, 8 (2d Cir. 1963).

2. multiplicity

His claim that the indictment must be dismissed on grounds of multiplicity, or that the Government must at this stage elect among counts, is denied. See United States v. Ketchum, supra at 7-8; United States v. Leibowitz, 420 F.2d 39 (2d Cir., Dec. 19, 1969). We cannot find that the alleged multiplicity "appears upon the face of the indictment so clearly that it is manifest that the Government cannot, as a matter of law, prove separate and distinct offenses." United States v. Birrell, 266 F.Supp. 539, 544 (S.D.N.Y.1967). Each provision allegedly violated and each count charged herein involve or may involve proof of elements in addition to or different from the others. Compare Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

B. *Counts 1-3*

1. Constitutionality of the Statute

a. delegation of legislative power

Defendant first seeks dismissal of Counts 1-3 on the ground that 50 U.S.C. App. § 462(a) constitutes an impermissibly broad delegation of legislative power by the Congress. This subsection provides, in pertinent part that it shall be a criminal offense to knowingly fail to perform any duty as established by the rules and regulations promulgated under the authority of the President "to prescribe the necessary rules and regulations to carry out the provisions of this title." 50 U.S.C. App. § 462(a); 50 U.S.C. App. § 460(b) (1) and (c).

His argument is premised on the alleged absence of any adequate legislative standard for the exercise of this delegation of authority, relying upon Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed 446 (1935). While concededly broad, we believe the standard supplied by Congress of "necessary * * * to carry out the provisions of this title" to be constitutionally adequate. The regulations which have been adopted directly relate to the fair and efficient functioning of the machinery of the draft system Congress established and "fill in the details" of the clear statutory objective. These rules and regulations have in the main been subjected to many years of administrative refinement and have received the approval implicit in successive Congressional reenactments of this statutory scheme. See generally, Selective Draft Law Cases, [Arver v. United States] 245 U.S. 366, 389, 38 S.Ct. 159, 62 L.Ed. 349 (1918); Seele v. United States, 133 F.2d 1015, 1019 (8th Cir. 1943); United States v. Herling, 120 F.2d 236 (2d Cir. 1941); 1 Davis, Administrative Law §§ 2.01-2.06 (1958). See also, Sayoretti v. Small, 244 F.2d 292, 296-297 (5th Cir. 1957) (power of the President to redelegate his rule-making authority).

b. Vagueness and Overbreadth

In an argument related to the foregoing, defendant alleges that 50 U.S.C. App. § 462(a) is both void for vagueness and overly broad because the duties required to be performed by a registrant are not specified within the statute himself and are "multitudinous" in number. The short answer is that to violate this section there must be a wilful and understanding failure or neglect to obey a known duty. See United States v. Hoffman, 137 F.2d 416, 419 (2d Cir. 1943).

2. Constitutionality of the Regulations

Turning from an attack on the general language of the statute, defendant trains his sights on the specific duties allegedly violated in Counts 1-3.

32 C.F.R. § 1632.14(b) (4) imposes a duty on the registrant at the time he reports for induction "to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished." It is the violation of this duty which is the basis of counts 1, 2 and 3 of this indictment.

a. void for vagueness and overbreadth: delegation of licensing power

Defendant first claims that this regulation is void for vagueness, because it fails to give a defendant "due notice that an act has been made criminal before it is done." Jordan v. De George, 341 U.S. 223, 230, 71 S.Ct. 703, 707, 95 L.Ed. 886 (1951). Second, he argues that in any event Congress never intended that a violation of this particular regulation be made criminal.

There is nothing to support defendant's latter contention—indeed the very language of 50 U.S.C. App. § 462 (a) seems ample refutation. His first argument, however, raises a far more substantial question.

That issue is not really whether the regulation is unduly vague in the manner alleged by defendant—indeed, defendant is only in violation when he knowingly disobeys a specific order he has received—but whether the regulation is overly broad or vague because of its failure to provide any express standard to guide and thereby limit the exercise of the power delegated to Armed Forces representatives.

This regulation requiring that an inductee obey all orders given him by appropriate personnel at an induction center appears at first blush to vest in such military officials untrammeled authority and discretion. From the face of the indictment itself, alleging violation of specific orders directed to defendant to cease making speeches and distributing leaflets, it is clear that this regulation can restrict an inductee's freedom of speech.

To make this observation, however, is not to resolve the issues presented. All limitations on First Amendment rights are not forbidden.[1] The Supreme Court in Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 465, 13 L.Ed.2d 471 (1965) reaffirmed the principle that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

Statutes permitting administrative officials discretionary power to "license" speech and speech-related activities have however been held unconstitutional, unless sufficiently limited in scope and purpose. See, *e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352 (1940); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267, 280 (1951); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-91, 93, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Shuttlesworth v. City of Birming-

[1] Justice Black, rejecting the argument that the First Amendment provides an unqualified right to free speech, stated that "[s]uch an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." Adderley v. Florida, 385 U.S. 39, 47-48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966).

ham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). These cases involved (1) statutes expressly aimed at speech-related activities, at least as authoritatively construed by the States; (2) discriminatory application of unfettered discretion by local officials; (3) the use of public places, streets, and parks. None of these factors appear from the moving papers to be present in this case.

The power vested in Armed Forces representatives to regulate the exercise of First Amendment rights through the enforcement of 32 C.F.R. § 1632.14(b) (4) is by its very context narrow in time, place and persons affected. Cf. Cox v. New Hampshire, 312 U.S. 569, 576, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396 (1941). The regulation only applies to inductees, and then only for that period of time while they are at the induction center.

Nevertheless, the narrow application of this regulation might not by itself validate its delegation of "licensing" power if the discretion vested in those authorized to give orders were unrestrained. The Government has a clear and substantial interest, however, in this regulation: it insures an orderly induction process and provides an essential link in a chain of regulations protecting the functioning of the system provided by Congress in the Selective Service Act for the raising of armies. 32 C.F.R. § 1632.14. We believe it clear from the statutory authorization (50 U.S.C. App. § 460(b) (3)) to prescribe regulations "to carry out the provisions of [the Selective Service Act]" that to be legal and enforceable, orders given pursuant to the authority of 32 C.F.R. § 1632.14(b) (4) must relate to the induction process.

Thus, this delegation of power is not unrestrained and is in sharp contradistinction to arbitrary and unauthorized orders unrelated to induction processing. Cf.

United States v. Spock, 416 F.2d 165, 173 n. 20 (1st Cir. 1969); United States v. Farinas, 299 F.Supp. at 854. We are not presented with any evidence indicating that this regulation has been administered or applied other than in a non-discriminatory manner consistent with this purpose. We conclude therefore that this regulation is not void on its face and that to the extent it represents a delegation of licensing power that discretionary power is restricted to within constitutional bounds.

b. restriction of freedom of speech by these orders

Having found this regulation sufficiently narrow and specific in the discretion it vests in administering officials, we are faced with the question of whether consistent with the Constitution a defendant may ever be held to account for refusing to obey orders to cease making speeches and distributing leaflets at an induction center. It is evident, even if the order given was authorized by the regulation and in fulfillment of the Government's interest (i. e. related to the induction process and directed at the non-speech elements (disruptive effects) of defendant's conduct), that orders given pursuant to this regulation can indirectly restrict an inductee's freedom of speech.

In United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678-1679, 20 L.Ed.2d 672 (1968) the Supreme Court stated:

> "This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

Accordingly, resolution of this issue requires a balancing of the two conflicting interests (that of the Government and of the individual) to determine which demands the greater protection under the circumstances. See United States v. O'Brien, *supra*.

Certainly the fact that the defendant is charged with making speeches and distributing leaflets in violation of an order directing him to stop such activity does not on its face demand that the balance be struck in defendant's favor. The decision in Callison v. United States, 413 F.2d 133, 136 (9th Cir. 1969)[2] makes this clear:

> "Here the very process of induction was under way and those present were subject to the processing orders of the officers in charge. Even so, appellant was not prevented from engaging in orderly speech nor orderly registration of opposition or grievance. He was precluded only from efforts to incite and solicit others to join with him in an expression of opposition to the very process they were undergoing. The order was thus directly related to a valid and important government purpose; that of maintaining an orderly process of induction—one free from disruption or disruptive potential.

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[2] *Callison* was a prosecution for refusal to submit to induction (not refusal to obey an order). However, the prosecution hinged on the proposition that Callison's refusal to stop soliciting signatures for a petition when ordered to do so, with knowledge that his conduct would make induction impossible and that disobedience would subject him to the consequences of a refusal to submit to induction, constituted refusal to submit to induction. Callison's defense was that the order was an impermissible intrusion on his First Amendment rights.

Further, the rights of others were involved. It must be noted that this was not an open public gathering.*

* Use of a public building for a specific public purpose, such as a jail, a schoolhouse or an induction center, will justify governmental limitation on exercise of First Amendment rights which interfere with that purpose. See Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)." [3]

Appellant's conduct was an intrusion upon persons met because their presence was required for a specific purpose. Appellant as an inductee had no greater right than any outsider to intrude himself upon those captively present by harangue upon any subject or solicitation for any purpose. Since any such intrusion is potentially offensive and since the gathering was Government compelled, the Government might decently feel a responsibility to maintain the gathering free from such intrusion.

On balance we find the restriction imposed upon appellant's rights by the order in question to be wholly reasonable.

Defendant is of course not precluded from attempting to show that the orders in this case impermissibly exceeded that which was necessary to further the Government's legitimate interest and that on balance defendant's interest is entitled to the greater protection.[4] By the same

[3] See also, Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

[4] Defendant's burden in this regard is substantial. Faced with the constitutionality of 50 U.S.C. App. §462(b) (3) prohibiting knowing destruction of a Selective Service registration certificate, the Supreme Court in United States v. O'Brien, *supra* set forth the following criteria for the balancing of interests:

"we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of

token, however, the foregoing establishes that the resolution of such constitutional issues as remain herein with regard to the first three counts (alleged constitutionally protected conduct by defendant and arbitrary and discriminatory application by military officials) must await development of the facts upon trial. See generally, United States v. Branigan, 299 F.Supp. 225, 237 (S.D.N.Y.1969).

C. *Count 5*

Defendant challenges the constitutionality of the statutory duty not to "knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto * * *," 50 U.S.C. App. § 462(a), the violation of which is the subject of count 5, on grounds of vagueness and overbreadth. He claims specifically that the 1948 addition of the term "or otherwise" renders the section unconstitutional, particularly if the addition is seen as a Congressional response to the 1943 decision in Bagley v. United States, 136 F.2d 567 (5th Cir. 1943).

For reasons similar to those discussed with regard to the claim immediately preceding, we deny defendant's motion. As stated by the First Circuit in United States v. Spock, 416 F.2d 165, 173 n. 20 (1969) in connection with a similar challenge to another portion of 50 U.S.C. App. § 462(a):

> "We do not believe that section 462(a) is overbroad or vague. A special obligation exists as to federal

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the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. * * *" 391 U.S. at 377, 88 S.Ct. at 1679.

> statutes to construe them to avoid unconstitutionality, Scales v. United States, [367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961)], so long as such does not result in substantial rewriting. The fact that a seemingly normal criminal statute * * * may in some instances apply to affect freedom of association or freedom of speech does not invalidate the statute. The court's obligation is, rather, to make sure that such a statute does not improperly infringe upon speech in any particular instance. Nor do we believe the indictment failed in its function of informing the defendants of the crime with which they were charged." [citations omitted]

Having found this portion of 50 U.S.C. App. § 462 (a) not to be unconstitutional on its face, we believe it clear that count 5 of this indictment must be upheld against constitutional attack. Defendant is specifically charged in part with "engaging in boisterous and unruly behavior" disruptives of the processing of either registrants so as to hinder or interfere with the administration of the Act. This is sufficient to state an offense. As with counts 1-3, the issue of whether or not defendant's conduct was in fact constitutionally protected by the First Amendment must await development of the facts upon trial.

D. *Count 4*

Defendant alleges that count 4 is duplicitous and must be dismissed because it charges two separate offenses, failure to report for and failure to submit to induction, in a single count. This claim has been specifically rejected by the Eighth Circuit. See United States v. Gutknecht, 406 F.2d 494, 495-496 (1969), cert. granted 394 U.S. 997, 89 S.Ct.

1595, 22 L.Ed.2d 775. From the facts developed to date herein it appears possible that both a failure to submit to induction as ordered (on August 13, 1968) and a failure to report for induction (a continuing duty) may be factually established. See United States v. Meyers, 410 F.2d 693 (2d Cir. 1969) (failure to submit to induction); United States v. Toussie, 410 F.2d 1156, 1158-1159 (2d Cir. 1969) (continuing duty to report for induction). See also, United States v. Trimm, 416 F.2d 1145 (2d Cir., October 9, 1969).

E. *Conclusion*

Accordingly, defendant's motion to dismiss the indictment is denied in all respects.

II *Discovery*

Request 1 is granted. Defendant is entitled to inspect and copy each of his written or recorded statements within the possession or control of the Government. See United States v. Garrett, 305 F.Supp. 267 (S.D.N.Y. Sept. 23, 1969) (defining statements). See also, United States v. Fassler, 46 F.R.D. 43 (S.D.N.Y. 1968).

Request 3 is denied except to the extent granted in Request 1.

Request 4 is granted except that defendant need not be furnished with the race of the members of his Local Board or with the residences of such members, other than whether or not they reside in the county in which the Board has jurisdiction. See United States v. Pierce, 69 Cr. 353 (S.D.N.Y. Nov. 3, 1969); United States v. Branigan, 299 F.Supp. 225, 237 (S.D.N.Y. 1969); Clay v. United States, 397 F.2d 901, 909-911 (5th Cir. 1968).

Request 5 is granted. See United States v. Branigan, *supra*, 299 F.Supp. at 238.

Request 6 is granted to the extent that "the Government shall state whether a quorum was present at each meeting of said [Board] relating to defendant's classification or status." *Id.*

Request 9 is denied. See United States v. Pierce, *supra* (wherein the Government represented by affidavit that the Classification Record (SSS Form 102) is available for examination and inspection at defendant's Local Board).

Request 10 is granted to the extent that the Government shall furnish a copy of the Record of Delinquents (SSS Form 302) as of the date on which defendant was ordered to report for induction. See United States v. Pierce, *supra*.

Requests 2, 7, 8, 11, 12, 13, 14 and 15 are denied.

III *Bill of Particulars*

Items 1, 6 and 11 are granted to the extent consented to by the Government.

Items 3, 8 and 13 are granted except as to subparts (a) thereunder.

Items 4, 9 and 14 are treated as requests made pursuant to Rule 16(b) and granted as such.

Item 5 is granted, if known.

Items 15 and 16 are granted to the extent consented to by the Government.

Item 19 is granted. See United States v. Branigan, *supra*, 299 F.Supp. at 237.

Items 20, 21 and 23 are denied except as granted in Requests 4, 5 and 6 of defendant's motion for discovery.

Item 26 is granted except that the time may be approximate.

Items 2, 7, 10, 12, 17, 18, 22, 24 and 25 are denied.

This shall be considered an order; settlement thereof is unnecessary.

So ordered.

Opinion of the United States District Court
Dated January 28, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 CR. 481 (MP)

MEMORANDUM

UNITED STATES OF AMERICA,

v.

JUAN PEDRO FARINAS,

Defendant.

Appearances:

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
By: PETER L. TRUEBNER,
Assistant United States Attorney

SANFORD M. KATZ, Esq.
Attorney for Defendant
30 East 42nd Street
New York, N. Y. 10017

MEMORANDUM

POLLACK, *District Judge.*

The defendant, Juan Pedro Farinas, moved orally at the conclusion of the trial herein for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Proce-

dure with respect to all counts of which he was convicted, or, in the alternative, for an arrest of judgment pursuant to Rule 34, with respect to those counts.

Prior to trial, the defendant had moved on various grounds, to dismiss the several counts contained in the indictment. This motion was denied by Judge Irving Ben Cooper in an opinion reported at 308 F. Supp. 459 (S.D. N.Y. 1969). That determination reserved to the defendant the right to show that the orders in this case of the representatives of the Armed Forces while at the place where his induction was to be accomplished did not exceed what was necessary to further the Government's legitimate interests and reserved for the trial the issue of whether or not defendant's conduct was in fact constitutionally protected by the First Amendment. In addition to raising these reserved matters, the present motion in effect renews the challenge to the statute and regulation on the grounds urged before Judge Cooper.

The evidence on the trial sufficiently satisfied the essential elements of the crimes charged. The jury could properly find that defendant's conduct was calculated to and in fact resulted in disruption of and hindrance of the induction process and the orderly operations at the Induction Center. There is no constitutional infirmity in the law or regulation and the application thereof was reasonably related to the governmental interest to be conserved. See, in addition to Judge Cooper's opinion, referred to above, *Callison* v. *United States*, 413 F.2d 133, 135-6 (9th Cir. 1969); *United States* v. *Meyers*, 410 F.2d 693, 695-6 (2d Cir. 1969).

Motions denied.

So Ordered.

Milton Pollack
U. S. District Judge

January 28, 1971

Opinion of the United States Court of Appeals
Dated September 28, 1971

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1027—September Term, 1970

(Argued: June 30, 1971 Decided: Sept. 28, 1971.)

Docket No. 71-1257

UNITED STATES OF AMERICA,

Appellee,

—against—

JUAN PEDRO FARINAS,

Appellant.

Before:

MOORE, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, *Pollack, Judge,* convicting appellant, after a jury verdict, of failing to obey the orders of Armed Forces representatives at the military facility where he was to be inducted, 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14(b)(4), failing to report for and submit to induction, 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14, and hindering and interfering with the administration of the Military Selective Service Act of 1967 by engaging in activity which disrupted the processing of other registrants, 50 U.S.C. App. §462(a). *Affirmed.*

LAWRENCE G. SAGER, Esq., American Civil Liberties Union, New York, N. Y. (Melvin L. Wulf, Esq., American Civil Liberties Union, and Sanford M. Katz, Esq., New York Civil Liberties Union, New York, N. Y., on the brief), *for Appellant.*

PETER L. TRUEBNER, Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Ross Sandler, Assistant United States Attorney, New York, N. Y., on the brief), *for Appellee.*

MANSFIELD, *Circuit Judge*:

Appellant Juan Pedro Farinas was indicted by a grand jury in the Southern District of New York in a five-count indictment charging that in three related aspects (Counts 1 through 3) he failed to obey the orders of Armed Forces representatives while at the military installation where he was to be inducted, 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14(b)(4), that he failed to report for and submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14, and that he hindered and interfered with the administration of the Military Selective Service Act of 1967 by engaging in activity which disrupted the processing of other registrants, 50 U.S.C. App. §462(a). The first three counts, detailing Farinas' failure to obey orders, were merged into one count at trial, and Farinas was convicted on all counts of the resulting three-count indictment on January 29, 1971,

after a two-day trial before Judge Pollack and a jury. We affirm the conviction.

The evidence adduced at trial, which must upon appeal be viewed in the light most favorable to the Government, with all permissible inferences drawn in its favor, *United States* v. *Dardi*, 330 F.2d 316, 325 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964), showed that Farinas had registered under Selective Service regulations at Local Board No. 7, Manhattan, on May 19, 1965. He received several student deferments before being classified I-A on January 23, 1968. On May 10, 1968, he complied with orders to report for a pre-induction physical examination and as a result of such examination was found qualified for military service. On July 26, 1968, he was mailed a notice ordering him to report for induction on August 13, 1968. On August 7, 1968, he voluntarily visited the office of the 108th United States Army Military Intelligence Group in the Federal Building in New York City and told the officer in charge, Louis J. Travaglino, that he would refuse to serve in the Armed Forces.

On the day appointed for his induction, Farinas participated in an early-morning anti-war demonstration on the part of about 50 persons in front of the Armed Forces Examining and Entrance Station at 39 Whitehall Street in New York City. At about 7:15 A.M. Farinas left the demonstrating group to enter the induction center, carrying a bag containing copies of a handbill expressing his opposition to American military involvement in Vietnam, and to the draft. He was met at the door of the induction center by Captain James Kenny, the chief processing officer at the center, who had observed the demonstration from his post inside the induction center and had concluded that Farinas was its focal point. Sergeant Elias Bereza,

a non-commissioned processing officer, was with Captain Kenny at the door. At Captain Kenny's request, Farinas presented his induction order. Captain Kenny and Sergeant Bereza then escorted Farinas to Sergeant Bereza's office, Room 203. Captain Kenny departed, but Sergeant Bereza remained and advised Farinas that since Farinas' distribution of literature would disrupt processing and possibly lead to violence because of objections by some registrants to having literature forced on them, he would have to surrender his leaflets until he had completed his own processing. After some discussion of Farinas' constitutional rights, Sergeant Bereza yielded and permitted Farinas to retain possession of the literature, with the warning, however, that any abuse of this constitutional right would result in Farinas' being declared an uncooperative registrant, subject to criminal prosecution. The pertinent regulations were read to Farinas and he was asked if he had any questions.[1] He did not.

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[1] AR 601-270 ¶3-31(c)(2), as recodified on March 18, 1969, reads as follows:

"(2) *Uncooperative.* A registrant who refuses to comply with instructions, rules or procedures prescribed for registrant processing, or who refuses to take part in some, or all, of the prescribed processing, testing, or examinations will be informed that his refusal constitutes a felony under the provisions of the Military Selective Service Act of 1967. He will be further informed that convictions of such offense in civil proceedings will subject him to punishment by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. If he persists in his refusal, the following action will be taken:

(a) If his conduct permits (e.g., if he is not engaging in physical or vocal activity which he will not refrain from doing in order to be reasoned with), he will be requested, but not required, to make a signed statement, dated, in his own handwriting, as follows (insert the phrase or phrases

Farinas then was permitted to enter Room 204, a large room in which registrants were ordered to report initially, fill out forms, read, and pass time at various stages of the induction process. In Room 204, Farinas began distributing his literature and talking to the other registrants. Sergeant Bereza appeared and asked Farinas to refrain from such conduct on the ground that he was interrupting the induction process. He asked Farinas to come with him to his office, which adjoined Room 204. Sergeant Bereza stepped into his office, but Farinas did not follow him; he continued passing out literature and talking to the other registrants. A brief scuffle ensued. After returning to Room 204 and again unsuccessfully ordering Farinas to go to Room 203, Sergeant Bereza summoned Captain Kenny to Room 204.

Kenny, Bereza, and Farinas went into Room 203 and Captain Kenny counseled Farinas pursuant to Army Regulation 601-270, advising him that the distribution of literature and the making of speeches would not be permitted "to the extent that it would interfere with his induction processing and with the processing of the other individuals who were in the building at that time." Farinas was told

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which pertain to him): 'I refuse to comply with instructions, rules or procedures prescribed for registrant processing.' 'I refuse to take part, or all, of the prescribed processing.' 'I refuse to take prescribed tests/examinations.' Such statement should be witnessed by at least two witnesses who will affix their signatures to the statement.

(b) His records will be returned to his local board. He will not be furnished any means of transportation.

(c) Letter of refusal to cooperate will be prepared in quadruplicate. Content and distribution of the letter will be as prescribed in (1)(b) above, except that in lieu of reference to refusal to be inducted, there will be included a description of the facts concerning his refusal to cooperate."

that if he engaged in such disruptive speechmaking and distribution of literature he would be declared an uncooperative registrant subject to criminal prosecution. Farinas replied, "I don't intend to cooperate with you or anybody else in this building." When the counseling was completed, Captain Kenny left the scene to attend to other business.

Ten minutes later Captain Kenny was summoned to Room 206, a room in which Armed Forces personnel and registrants were engaged in filling out and checking various forms. Captain Kenny found Farinas standing in front of a group of registrants and addressing them "in a very loud, boisterous manner, telling them they did not have to cooperate with us, the war was an immoral war, et cetera." Captain Kenny approached Farinas and ordered him to stop, reminding Farinas of the counseling which he had provided only minutes before. Farinas did not stop. Kenny then cleared the room of other persons, whose activities had already been halted by Farinas' conduct, and declared Farinas an uncooperative registrant. Farinas was escorted down the stairs and departed from the building, still making anti-war speeches and distributing leaflets.

Farinas was initially indicted in a one-count indictment on November 15, 1968, for failure to obey certain unspecified orders of the representatives of the Armed Forces. This indictment was dismissed by Judge Tenney upon a motion by Farinas, *United States* v. *Farinas*, 299 F. Supp. 852 (S.D.N.Y. 1969), on the ground that it was overly vague. Farinas was reindicted on May 29, 1969, in the indictment upon which he was tried. His attempts to secure dismissal of the May 29 indictment on some of the

grounds now urged were unsuccessful, *United States* v. *Farinas*, 308 F. Supp. 459 (S.D.N.Y. 1969).

We begin with the argument which counsel for Farinas emphasized during oral argument. It is contended that the regulation which forms the basis for conviction on Count One (the consolidated count) impinges on First Amendment rights and is unconstitutionally vague and overbroad, and that in addition it exceeds the intended and permissible scope of the rule-making authority which Congress delegated. The regulation in question reads as follows: "Upon reporting for induction, it shall be the duty of the registrant . . . (4) to obey the orders of the representatives of the Armed Forces at the place where his induction will be accomplished." 32 C.F.R. §1632.14(b)(4). The regulation is given teeth by 50 U.S.C. App. §462(a), which reads in part as follows:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder . . . who in any manner shall knowingly fail or neglect to perform such duty . . . shall . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000 . . . ."

It is possible that this regulation, viewed wholly apart from the context in which it is applicable, might raise serious constitutional questions, cf. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969). However, when viewed in context as applied it appears to be reasonably essential to the performance of a basic governmental function, and sufficiently narrow and limited in scope to constitute a permis-

sible restriction upon the exercise of First Amendment rights, which are not absolute, *Cox* v. *Louisiana,* 379 U.S. 536, 559 (1965). A key to our interpretation is to be found in the opening proviso of the regulation itself, *"Upon reporting for induction . . . ."* Thus the regulation by its terms applies only to registrants who have reported to the induction center, and it may not be employed to suppress speech beyond what is required by the exigencies of the induction process. *Callison* v. *United States,* 413 F.2d 133 (9th Cir. 1969). Any restriction on speech imposed to facilitate the induction process, to which the regulation is expressly confined, will be limited both in time (to the day of induction) and place (to the induction area itself). In this case the regulation had no effect—nor could it legitimately have had an effect—upon the anti-war demonstration which went on outside the induction center, and in which Farinas himself participated without restraint before entering the induction center.

The First Amendment is not a license to impede and disrupt the orderly performance of an essential function of government, *United States* v. *O'Brien,* 391 U.S. 367 (1968). The public and private interests at stake must be weighed. For instance, the Government's use of a public building for a valid and specific governmental function entitles it to limit the exercise within that building of First Amendment rights to the extent that such exercise will interfere with the performance of that function. *Adderly* v. *Florida,* 385 U.S. 39 (1966). Here the Government was entitled to an orderly induction process, free from disruption; and other registrants who were there pursuant to orders, being a captive audience without right to leave, were entitled to be free from harassment unconnected with the induction process, *Callison* v. *United States, supra.* In view of the countless

types of specific conduct that could be engaged in to impede the processing of inductees, to require that the regulation be more specific, or that it spell out each such species of conduct, would be unreasonable and would serve no useful purpose. The objective of the regulation is clear: to authorize the issuance of orders that would facilitate the uninterrupted processing of inductees. By its own terms and by reason of its place in a specific regulatory scheme, the regulation must be construed narrowly and constricted in its applicability by limitations as to person, time, and place that will avoid unconstitutionality. *Scales* v. *United States*, 367 U.S. 203 (1961); *United States* v. *Spock*, 416 F.2d 165, 173 n.20 (1st Cir. 1969). We therefore find no constitutional infirmity. *Eisner* v. *Stamford Board of Education*, —— F.2d —— (Dkt. No. 35345, 2d Cir., Mar. 5, 1971).

A jury question was thus presented at trial as to whether the orders which Farinas disobeyed (to cease his disruptive distribution of literature, speech-making, and other boisterous conduct) were related to the orderly conduct of the induction process. There was more than ample evidence from which the jury could infer that the orders were so related.

As for the delegation argument, we think it clear that Congress could constitutionally grant to military personnel at the induction center the power to give necessary orders carrying penalties for disobedience. Registrants are not subject to military jurisdiction and punishment for their refusal to obey lawful orders until they take the oath of induction, *Billings* v. *Truesdell*, 321 U.S. 542 (1944). Nothing in the statute, 50 U.S.C. App. §462(a), suggests that Congress did not intend to authorize the adoption of regulations such as the one here in question, which insures orderliness and freedom from disruption that are essential to the

speedy, efficient processing of inductees. We find such delegation constitutional in light of the limited scope of the regulation, considered above.

A second contention on appeal relates to the admission into evidence of testimony concerning Farinas' conduct in Room 206, where he was finally declared an uncooperative registrant. Two arguments are offered in support of this claim—first, that the evidence was inadmissible unless qualified by a proper limiting instruction because the Government did not, in its bill of particulars, specify Farinas' conduct in Room 206, and second, that since Farinas' conduct in Room 206 was not considered by the grand jury, it should not be considered by the petit jury.

Farinas' reliance on the notice argument is foreclosed by the requirement that "the deviation between the Government's bill and its proof at trial" be "of substantial prejudice to the defendant," *United States v. Glaze*, 313 F.2d 757, 759 (2d Cir. 1963). Here no such prejudice has been shown. This is not a case in which the Government has held back the name of a victim or key witness, *United States* v. *Glaze, supra;* cf. *United States* v. *Tomasetta,* 429 F.2d 978 (1st Cir. 1970); *United States* v. *Agone;* 302 F.Supp. 1258 (S.D. N.Y. 1969). The difference between the bill and the proof here stemmed from a failure by the Government to designate one room in a building otherwise designated in which an ongoing course of conduct was pursued. Appellant has not claimed that admission of this evidence would in all events have been error, or even that he was surprised by the Room 206 testimony and should have been granted a continuance to prepare a rebuttal to it. Farinas instead contends that a limiting instruction should have been given, explaining to the jury that the Room 206 testimony bore only on Farinas' intent. However, no such instruction was

requested, and in view of the fact that the evidence related to a single continuous course of conduct occurring within a period of an hour, the trial court's failure to give one *sua sponte* was not plain error, Rule 52(a), F.R.Cr.P.

For similar reasons, we reject the assertion that the Room 206 evidence was improperly admitted because Captain Kenny did not mention it in his testimony before the grand jury. Since it was admissible to show intent, the fact that it may not have been presented to the grand jury is immaterial. This case is not one in which the defendant could have been convicted for an offense completely separate from that for which he was indicted, cf. *United States* v. *Agone, supra.* To hold that the Room 206 evidence was inadmissible because not presented to the grand jury would be tantamount to requiring that the Government submit its entire case to that body. We decline to establish such a rule.

A third contention is that Farinas' conviction on Count Four—failure to report for and submit to induction—is invalid because officials at the induction center failed to follow the procedure outlined in AR 601-270 ¶¶37, 40.[2] The argu-

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[2] AR 601-270, ¶¶37, 40:

"37. *Induction.* a. the following procedure will be followed in the induction of all registrants into the Armed Forces:

(1) Registrants who have been determined to be fully qualified for induction in all respects will be assembled. The induction officer will inform them of the imminence of induction, quoting the following:

'You are about to be inducted into the Armed Forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces indicated.'

(2) Any registrant who fails or refuses to step forward when his name is called will be removed quietly and cour-

ment is unpersuasive on the facts of this case. Farinas was amply warned pursuant to Army Regulation 601-270 that he would be subject to criminal sanctions if he were declared an uncooperative registrant. Moreover, his own conduct, including his statement on August 7, 1968, to Travaglino that he would refuse to serve in the Armed Forces and his statement on August 13, 1968, to Kenny that he would not cooperate with him or anyone else in the induction center, provided a sufficient basis for the inference that he did not intend to take part in the prescribed processing or to submit to induction, and that it would have been a futile gesture to read to him the prescribed governmental form. *United States* v. *Trimm*, 416 F.2d 1145 (2d Cir. 1969); *United States* v. *Meyers*, 410 F.2d 693 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969).

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teously from the presence of the group about to be inducted and processed as prescribed in paragraph 40c."

"40. Processing steps for registrants in special categories . . . .

* * * * *

c. Registrants who refuse to submit to induction. Any registrant who has been removed from the group as prescribed in paragraph 37a(2) and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He will be informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 37a(1), and his name and service number again will be called. If he steps forward at this time, he will be informed that he is a member of the Armed Forces concerned, using the language specified in paragraph 37a(3). If, however, he persists in refusing to be inducted, the following action will be taken: [the following material sets forth procedures for taking a signed statement, preparing letters to various authorities, and notifying the United States Attorney.]."

Farinas' allegation that Count Four of the indictment is duplicitous must also be rejected. Although that count alleges conjunctively a refusal to report for and submit to induction, it apprised Farinas with reasonable certainty of the charge against him. Moreover, the procedure of reporting is a continuous one, involving a series of steps from the time of a registrant's arrival at the center until he is asked to step forward, whereupon reporting mergers into induction. A registrant cannot satisfy the obligation to report merely by showing up at the center and then departing before he is processed or taking some other action which prevents his being processed. Here the evidence was sufficient to support a finding that the defendant was guilty as charged, since his statements and conduct justified the inference that he would neither report for nor submit to induction. See *United States* v. *Gutknecht*, 406 F.2d 494, 416 (8th Cir. 1969), *rev'd on other grounds*, 396 U.S. 295 (1970); *Billings* v. *Truesdell*, 321 U.S. 542, 557 (1944).

We have reviewed the other contentions raised by Farinas including his assertions of error in the court's charge to the jury, and his claim that the evidence was insufficient to sustain a conviction on Counts One and Five, and find them to be without merit.

The conviction is affirmed.

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No. 71-714

In the Supreme Court of the United States

OCTOBER TERM, 1971

JUAN PEDRO FARINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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434-736—72——1

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction is reported at 448 F. 2d 1334 (Pet. App. 27a). The opinion of the district court denying petitioner's post-trial motions is unreported (Pet. App. 25a). The opinion of the district court denying petitioner's motion to dismiss the second indictment is reported at 308 F. Supp. 459 (Pet. App. 10a). The opinion of the district court dismissing the first indictment is reported at 299 F. Supp. 852 (Pet. App. 1a).

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1971. Mr. Justice Marshall extended the time for filing a petition for certiorari to November 27, 1971, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Selective Service regulation requiring prospective inductees to obey the orders of armed forces personnel at the induction station is unconstitutionally vague or was unconstitutionally applied here.

2. Whether that regulation is within the scope of powers Congress has delegated, and may permissibly delegate, to the executive.

3. Whether petitioner's conviction for refusal to submit to induction can be sustained where petitioner's uncooperative behavior made it necessary to oust him from the induction station before he was given the order to take "one step forward".

4. Whether petitioner's conviction for hindering and interfering with the administration of the Selective Service by making speeches, distributing literature, and engaging in boisterous and unruly behavior disruptive of the processing of other registrants impermissibly infringed petitioner's First Amendment rights.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a three-count indictment charging (1) that he failed to obey the orders of representatives of the Armed Forces assigned to the military installation where his induction was to be accomplished, in violation of 50 U.S.C. App. 462(a) and 32 C.F.R. 1632.14(b)(4); (2) that he failed to report for and submit to induction in violation of 50 U.S.C. App. 462(a) and 32 C.F.R. 1632.14; and (3) that he hindered and interfered with the administration of the Military Selective Service Act of 1967, by engaging in activity disruptive of the processing of other registrants, in violation of 50 U.S.C. App. 462(a). Petitioner was sentenced to imprisonment for two years on each of the three counts, to be served concurrently, with a recommendation that he be considered for parole after six months pursuant to 18 U.S.C. 4208(a)(1) (Tr. 250).[1]

On August 13, 1968, the day he was ordered to report for induction, petitioner participated in an early-morning demonstration of approximately 50 persons outside the induction station. The demonstrators carried signs, picketed, and chanted slogans indicating opposition to the war in Viet Nam (Tr. 21). At approximately 7:15 A.M. petitioner entered the induction station carrying leaflets expressing opposition to

[1] "Tr." refers to the trial transcript.

the draft and to the war in Viet Nam (Gov. Ex. 3, Tr. 22, 25, 28, 263).

He was met at the door by Captain James Kenny, the chief processing officer at the center, who had concluded that petitioner was the focal point of the demonstration (Tr. 21, 23). Captain Kenny and Sergeant Bereza, a processing officer, took petitioner to Sergeant Bereza's office, Room 203, so that he might be counseled "before things even began of what might happen should he be declared uncooperative." (Tr. 22–23, 43).

Sergeant Bereza advised petitioner that since his distribution of literature would disrupt processing and possibly lead to violence because of objections by some registrants to having literature forced on them (Tr. 90), he would have to surrender his leaflets until he was finished processing (Tr. 77). Sergeant Bereza told petitioner that he could distribute leaflets on his lunch break outside of the building (Tr. 91). When petitioner insisted that he had a constitutional right to distribute leaflets and that the literature was his property, Sergeant Bereza permitteed him to retain possession of the literature, with the warning, however, that any abuse of this privilege could result in his being declared an uncooperative registrant (Tr. 77). The pertinent regulations were read to petitioner and also given to him to read, and he was asked if he had any questions. He did not (Tr. 78).

Petitioner was then permitted to enter Room 204, a large room serving as a control center in which registrants are ordered to report initially for orientation

(Tr. 47, 48, 95, 96). In Room 204, petitioner distributed his literature and talked to the other registrants (Tr. 79). Sergeant Bereza appeared and asked petitioner to refrain from such conduct, explaining that petitioner was interrupting processing and, that because of the large number of people, a "smooth flow" was required. He asked petitioner to come with him to his office, which adjoined Room 204 (Tr. 79). Petitioner did not follow him, but continued passing out literature and talking to the other registrants (Tr. 80). After Sergeant Bereza returned to Room 204 and again unsuccessfully ordered petitioner to go to Room 203, a brief scuffle ensued between the two during which "[e]verything was disrupted." Captain Kenny was summoned (Tr. 80–81).

Captain Kenny counseled petitioner pursuant to Army Regulation 601–270,[2] advising him that "the distributing of leaflets [and] making speeches, would not be tolerated to the extent that it would interfere with his induction processing and also induction processing of the other individuals who were in the building at the time" (Tr. 26). Petitioner was informed that if he engaged in such disruptive speechmaking and distribution of literature, he would be declared an uncooperative registrant subject to criminal prose-

[2] AR 601–270 ¶ 3–31(c)(2) is set out in the margin of the court of appeals opinion (Pet. App. 30a). This regulation provides for special counseling whereby a registrant indicating his intent to refuse to comply with instructions concerning processing, or who refuses to take part in the processing, is taken aside and advised of the possible consequences of his action. He is then given a second chance. *United States* v. *Trimm*, 416 F. 2d 1145, 1149 (C.A. 2).

cution. Petitioner replied, "I don't intend to cooperate with you or anybody else in this building" (Tr. 26). Captain Kenny then left (Tr. 27).

About ten minutes later, Captain Kenny was summoned to Room 206, a room in which Armed Forces personnel and registrants were engaged in filling out and checking various forms (Tr. 27, 60). Captain Kenny found petitioner standing in front of a group of registrants "talking in a very loud boisterous manner, telling them they did not have to cooperate with us, the war was an immoral war, et cetera" (Tr. 27, 60). Captain Kenny approached petitioner, stating "'Mr. Farinas you are going to have to stop. I counselled you just a few minutes ago and told you what would happen' " (Tr. 27). Captain Kenny testified that petitioner "refused to stop, he didn't even stop yelling and screaming to listen to me, so I removed the individuals sitting there, sent them to another room." (Tr. 27, 64). Captain Kenny then declared petitioner to be an uncooperative registrant, and escorted him down the stairs and out the building (Tr. 27, 65). Petitioner continued making his speeches and distributing literature to individuals he passed on the stairs (Tr. 66).

ARGUMENT

1. Petitioner argues that 32 C.F.R. 1632.14(b)(4) which requires prospective inductees "to obey the orders of the representatives of the Armed Forces" at the induction station is unconstitutionally vague.

The regulation is limited in time and place and persons affected. It authorizes Armed Forces person-

nel *at* the induction station to issue appropriate orders *to* potential inductees *during* the induction process to facilitate their processing. The regulation serves the important governmental interest of preserving order in the operation of an induction station, is unrelated to any effort to control expression, and only incidentally restricts its exercise. See *United States* v. *O'Brien*, 391 U.S. 367, 376; *Callison* v. *United States*, 413 F. 2d 133, 136 (C.A. 9); cf. *Adderley* v. *Florida*, 385 U.S. 39.

Both courts below held that the regulation could not be employed to limit speech beyond what is practically required, and noted that the regulation was by its very context narrow in time, place, and persons affected. Cf. *Cox* v. *New Hampshire*, 312 U.S. 569.

Despite the opportunity to do so, petitioner has made no showing that the orders he disobeyed were not necessary to the orderly conduct of the induction process, and there was ample evidence that they were necessary (Pet. App. 26a–35a).

Petitioner lacks standing to raise other hypothetical unconstitutional applications and, moreover, has made no showing of improper administration of the regulation in other circumstances. See *Callison* v. *United States*, *supra*; *United States* v. *Meyers*, 410 F. 2d 693 (C.A. 2), certiorari denied, 396 U.S. 835.

2. Petitioner argues that 50 U.S.C. App. 460 (b)(1) and (c), pursuant to which the challenged regulation was promulgated, constitute an impermissible delegation of legislative power (Pet. App. 13a–14a, 35a–36a).

Sections 460(b)(1) and (c) authorize the President and his delegates "to prescribe the necessary rules and regulations to carry out the provisions of [the Selective Service Act]." Section 462(a) makes it a criminal offense knowingly to fail to perform any duty as established by such rules and regulations.

The propriety of delegating to the President the power to make rules and regulations for administering the draft law has long been established. See *e.g., Selective Draft Law Cases* (*Arver* v. *United States*), 245 U.S. 366.

As the court of appeals held, the delegation to military personnel at the induction station of the power to give necessary orders is an appropriate exercise of the delegated power (Pet. App. 35a–36); the protection it affords to the induction process is "necessary" to carry out the provisions of the Act. The limited discretionary power conferred on officials to give appropriate orders with penalties for disobedience raises no substantial question as to an impermissible delegation of legislative power.

Petitioner also contends that Congress never intended that a violation of 32 C.F.R. 1632.14(b)(4) be made criminal. But, as the district court observed, (Pet. App. 15a), 50 U.S.C. App. 462(a) itself provides that it is a crime to "knowingly fail or neglect or refuse to perform any duty required * * * under * * * the rules or regulations made pursuant thereto." The regulation creates a duty, backed by criminal sanctions under 50 U.S.C. App. 462(a), since it explicitly provides that "(b) Upon reporting for induction, it

shall be the *duty* of the registrant * * * (4) to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished * * *" (32 C.F.R. 1632(b)(4); emphasis added).

3. Petitioner argues that his ouster from the induction station prior to his final induction ceremony precludes his conviction for failure to submit to induction. But his own actions so frustrated the orderly induction process that it became impossible for him to be treated in accordance with the regulations. After being counselled by Captain Kenny, petitioner stated: "I don't intend to cooperate with you or anybody else in this building" (Tr. 26), and then continued his disruptive activities until he was declared uncooperative and removed from the building. Given his actions, it is of no consequence that petitioner was not formally offered induction. *United States* v. *Meyers*, 410 F. 2d 693 (C.A. 2), certiorari denied, 396 U.S. 835; *United States* v. *Trimm*, 416 F. 2d 1145 (C.A. 2).[3]

4. Petitioner contends that his conviction under Count V cannot stand. This count charged that petitioner "by force and violence and otherwise hindered and interfered with the administration of the Military

[3] Petitioner's case does not present any conflict with *United States* v. *Kroll*, 402 F. 2d 221 (C.A. 3), certiorari denied, 393 U.S. 1043, or *Chernekoff* v. *United States*, 219 F. 2d 721 (C.A. 9). *Kroll* merely states the usual rule that the final induction ceremony must be followed before a registrant is guilty of a crime, and the case did not involve a disruptive registrant like petitioner who made the ceremony impossible. In *Chernekoff* it was held that the final induction ceremony must be followed "unless the selectee himself makes it impossible" (219 F. 2d at 725).

Selective Service Act * * * [by persisting in] * * * making speeches, distributing literature, and engaging in boisterous and unruly behavior" (Pet. App. 9a), Petitioner contends that he was "never violent" and appears to cite *Bagley* v. *United States*, 136 F. 2d 567 (C.A. 5), for the proposition that proof of force and violence or their substantial equivalent was required. This proposition has been rejected in *United States* v. *Eberhardt*, 417 F. 2d 1009, 1013 (C.A. 4), certiorari denied *sub nom. United States* v. *Berrigan, et al.*, 397 U.S. 909, where the Court noted that: "The words 'or otherwise' were added by section 12 of the Selective Service Act of 1948 * * * to relieve the prosecution from the obligation to prove the use of aggressive force or violence."

As discussed above, the record clearly shows that petitioner's activity disrupted the induction process of himself and other registrants. Captain Kenny testified that because of petitioner's activities, "we could not process these individuals further" and the other inductees were sent to another room. (Tr. 27.)

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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